89-385

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

Joe L. Barr, a/k/a Joseph L. Barr,

Petitioner,

v.

UNITED PARCEL SERVICE, INC., and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the appellate court err in applying a breach of fair representation standard which gives unions unlimited discretion to deprive injured employees of all remedies for breach of contract, and which deviates from the standard enunciated by this court in *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976)?

2. Did the appellate court fail to apply the proper standard for ruling on a motion for a judgment notwithstanding the verdict, in that the court re-weighed credibility determinations made by the jury, relied on facts not supported by the record, failed to view the evidence in the light most favorable to the nonmoving party, failed to give the nonmoving party the benefit of all reasonable inferences and substituted its judgment for that of the jury?

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The decision of the United States Court of Appeals for the Second Circuit is reported at *Barr v. United Parcel Service, Inc.*, 868 F.2d 36 (2d Cir. 1989). The jury in the district court returned a general verdict on the issue of liability in the Petitioner's favor on April 22, 1988. In an unpublished decision on February 16, 1988, the district court entered an order denying Respondents' motion for judgment notwithstanding the verdict.

JURISDICTION

Invoking federal jurisdiction under 29 *U.S.C.* § 185, the Petitioner brought this suit in the United States District Court of the Eastern District of New York.

On February 16, 1988 the district court entered an order denying the Respondents' motion for judgment notwithstanding the jury's verdict.

On Respondents' appeals, the Second Circuit on February 10, 1989, entered a judgment and opinion reversing the district court and directing that Petitioner's complaint be dismissed based upon insufficient evidence to support the jury's verdict.

On April 17, 1989, the Second Circuit denied Petitioner's petition for rehearing.

On July 11, 1989, Justice Marshall ordered that the time for filing this petition for writ of certiorari be extended to and including August 31, 1989.

The Jurisdiction of this Court to review the judgment of the Second Circuit is invoked pursuant to 28 *U.S.C.* § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this petition is Title 29, *U.S.C.* § 185 (a), which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner Joe L. Barr commenced this action pursuant to Section 301 of the Labor Management Relations Act, 29 *U.S.C.* § 185. The Petitioner was discharged after fourteen years of unblemished employment with Respondent United Parcel Service ["the Company" herein], allegedly because he violated a company rule requiring employees to show any items in their hands to the security guard when leaving the Company's premises.

When the Petitioner left work after his shift on March 1, 1983, he had in his possession a flat paper bag containing dental forms which he had obtained from Union Shop Steward John Brown. Aware of the company rule, the Petitioner showed the security guard, Mr. Mateo, the contents of the bag, removed the dental forms from the bag, and held the bag upside down to show that it was empty. The Petitioner was accompanied by two other employees who witnessed the incident and corroborated the Petitioner's version of these events. The Petitioner and the

two other employees proceeded to the parking area where the Petitioner's car was parked (J.A. 524-31, 649, 689-90) ["J.A." refers to the Joint Appendix filed in the appellate court].

As they approached the car, they were confronted by the Company's Loss Prevention Clerk, who said that Security Guard Mateo had accused the Petitioner of failing to show the contents of the bag. The Petitioner again showed the contents of the bag, removed the dental forms, and held the bag upside down, demonstrating to the Loss Prevention Clerk the exact manner in which he had shown the contents to the security guard. The two fellow employees told the Clerk that they had witnessed the event and that the Petitioner had indeed showed Mateo the contents of the bag in the manner described (J.A. 531, 692-93). The Clerk replied only that "it was too late," and wrote down the Petitioner's license plate number (J.A. 530-31).

Although the Petitioner was shocked by the accusation, he was not surprised by its source. Security Guard Mateo had demonstrated his apparent animosity toward the Petitioner about two weeks prior to the March 1 incident. After completing his shift on February 17, 1983, the Petitioner was waiting for Company Supervisor James Gummer, who had asked for a ride home with the Petitioner. They had arranged to meet at the same gate through which the Petitioner exited on March 1, and when Gummer did not arrive at the appointed time, the Petitioner asked Mateo if he could use the phone at the security desk. Mateo's response was, "You're not going to use the m----- f---- phone." When Petitioner said that he would just ask to use the phone in the security office, Mateo said, "You're not going to use that m---- f----phone either" (J.A. 521-23).

Less than an hour after Mateo's accusation that

Petitioner failed to show the contents of the bag on March 1, the Company Manager notified Union Shop Steward Alfred Henley of the claim against the Petitioner. Henley in turn notified Shop Steward John Brown. Both Brown and Henley were aware of the seriousness of the allegations, and that within the last year an employee was fired on the spot based on a similar accusation by Mateo (J.A. 960-61, 1087, 1108, 1376-87). Although the Union and its agents were aware of the seriousness of the charge against Petitioner, and knew that he could be fired on the spot without any "cooling off" notice, the Union took no action, except to briefly speak with the Petitioner, during the 45-hour period between the time Union agents were notified and the time the Petitioner was discharged. The Petitioner had related to Union agents Henley and Brown the fact that he had indeed shown the contents of the bag to Mateo, and that there were two other employees, Scott and Griffin, who witnessed the incident (J.A. 533-36). The Union did not contact the witnesses, however, until some time after the Petitioner was discharged. (J.A. 650, 693-94).

The Division Manager Discharge Meeting (March 3, 1983)

The Petitioner and other employees testified at trial that the normal procedure called for the Union business agent (William Pritchard, in this instance) to represent an employee at a Division Manager level meeting (J.A. 545, 610, 683, 733-34, 748). Although Mr. Pritchard was on the Company's premises drinking coffee and talking with Division Manager David Donnelly prior to the discharge meeting (J.A. 544-45, 569), Pritchard did not appear on the Petitioner's behalf at the meeting. When the Petitioner requested that Pritchard be present, he was told by Shop Steward Henley that Pritchard had gone home. When the Petitioner asked if he could have the witnesses to the incident present at the meeting, Henley told him that Pritchard instructed him not to bring the witnesses (J.A.

545). Moreover, Shop Steward Henley did not request that Division Manager Donnelly speak to the eyewitnesses prior to firing the Petitioner (J.A. 546), notwithstanding Donnelly's policy of interviewing witnesses *if requested by the Union* prior to making a decision (J.A. 1350).

At the meeting Security Guard Mateo and the Loss Prevention Clerk testified against Petitioner (J.A. 545). Although the Petitioner tried to raise the point that there were witnesses to corroborate his version of the incident, Shop Steward Henley failed to mention the existence of the witnesses (J.A. 1025). Henley further failed to impress upon Division Manager Donnelly the fact of the February 17 telephone incident, which indicated that Mateo had some animosity toward the Petitioner (J.A. 871). Donnelly concluded that Mateo did not have an "axe to grind" against Petitioner, and on the basis of the testimony from Mateo and the Loss Prevention Clerk, and the lack of any evidence to corroborate the Petitioner's testimony, Donnelly fired the Petitioner on the spot (J.A. 864).

The District Manager Post-Discharge Meeting (March 7, 1983)

Those present at the District Manager Post-Discharge Meeting included the Petitioner, Union Business Agent Pritchard, Shop Steward Henley, Division Manager Donnelly and District Manager Petley (J.A. 548).

Although it had been decided that Business Agent Pritchard would represent the Petitioner at this meeting, Pritchard made no attempt to speak with the Petitioner about the meeting. Moreover, Pritchard admitted he "didn't really know very much what the hell the Company was talking about" regarding the Petitioner's alleged violation of the Company rule (J.A. 1087). The Union did not bring the witnesses to the meeting, nor did the Union request that Mr. Petley interview them prior to making a

decision (J.A. 834-35). Furthermore, the Union did not insist on the presence of Petitioner's accuser, Mateo, and at the meeting Pritchard did not raise the February 17 telephone incident as evidence of Mateo's bias (J.A. 621, 842-47).

The only effort put forth by the Union to represent the Petitioner at the meeting consisted of Pritchard's plea that the Petitioner should not be discharged because he was a good employee, that he never had a problem with anybody and that management really liked him (J.A. 1034). District Manager Petley refused to overturn Division Manager Donnelly's decision.

The March 14, 1983 Arbitration

On March 9 or March 10, 1983, Pritchard asked the Union's attorneys to arrange for a fast arbitration of Petitioner's discharge. The attorneys arranged for an arbitration on the following Monday morning, March 14, 1983 (J.A. 1130).

Between March 9 or March 10 and the morning of March 14, neither the Union nor its attorneys took any action to prepare for the arbitration (J.A. 550, 1130). At about 35 minutes prior to the start of the arbitration hearing, one of the Union attorneys met with the Petitioner, the two witnesses, Shop Steward Henley, Business Agent Pritchard, and Shop Steward John Callan (J.A. 550-51). This meeting constituted the Union's entire preparation for the arbitration, notwithstanding the fact that this was the Petitioner's last hope to save his 14-year job, his pension, and his reputation.

At the arbitration meeting the Petitioner testified that he had indeed shown Mateo the contents of the bag, and demonstrated the manner in which he had done so once again. The witnesses, who were now permitted to testify,

corroborated every aspect of the Petitioner's testimony.

No testimony was elicited regarding the February 17 telephone incident with Mateo, and the Union made no attempt to explain why the witnesses had not been presented at either the Discharge or Post-Discharge meetings (J.A. 1344-55).

The Arbitrator upheld the discharge based upon the following grounds. First, the arbitrator, presented with no reason to disbelieve Mateo's version of the facts, credited Mateo's testimony and stated that "[t]here is no evidence that Mateo had an ulterior motive or that he ever brought dubious or frivolous charges against UPS employees. He had no axe to grind with BARR." At trial, Pritchard testified, among other things, that had he "known" of the prior Barr/Mateo telephone incident, he would have wanted the Arbitrator to know about it (J.A. 1134-35). However, the Union had knowledge of this prior incident (J.A. 871) but failed to use this fact to discredit Mateo at the Arbitration proceeding. Second, the Arbitrator stated that he could not credit the testimony of the witnesses for the following reason:

> To discredit the guard's account and credit that of Barr's two co-workers I would have to believe that . . . Union stewards, knowing that termination was being considered, and having two witnesses, deliberately withheld their identities at the March 3 hearing and at the grievance hearing a few days later when Management could have reconsidered or revised its discharge decision. It cannot accept that scenario.

(App. A-29; J.A. 1353).

The Arbitrator refused to accept Union counsel's argument that the Union and the Company were engaged in adversarial tactics with respect to withholding eyewitnesses from the grievance level proceedings because:

> [N]o Union witness volunteered such explanation and Steward HENLEY, who is alleged to have known about SCOTT and GRIFFIN before the March 3 meeting with DONNELLY, was not called to testify although he was present at the arbitration hearing. Business Agent PRITCHARD, who did testify, did not explain why he did not give any names to the district manager at the grievance discussions.

(App. A-30; J.A. 1354.)

Hence, without the submission of credible evidence by the Union to show Security Guard Mateo had an "axe to grind" or an "ulterior motive," without the Union having called the eyewitnesses to either of the two prior grievance meetings, and without the Union's explanation of the witnesses' previous absences, the Arbitrator was constrained to uphold the Petitioner's discharge.

Before and during the trial in district court the Union offered various conflicting reasons for its refusal to allow the witnesses at the Discharge and Post-Discharge meetings (J.A. 1109-12); *Barr v. United Parcel Service, Inc.*, *supra*, 868 F.2d at 44. Union Business Agent William Pritchard admitted having told Union Shop Steward Henley not to bring the witnesses to the Donnelly meeting because the Company might have thought the Union was trying to be cute or smart (J.A. 1090). Nevertheless, Mr. Pritchard also said that when he learns of witnesses at a

Step 1-level meeting, he stops the meeting to speak with them (J.A. 1075).

At trial, Mr. Pritchard testified he never brings witnesses to grievance meetings (J.A. 1109). However, in his June 27, 1984 affidavit, he said on occasion he did bring witnesses to grievance meetings (J.A. 1110).

At trial, Mr. Pritchard testified that his policy against bringing witnesses is not based on avoiding antagonizing management. However, in his November 1986 affidavit, he said his policy against bringing witnesses to grievance meetings is based on avoiding antagonizing management (J.A. 1111-12).

Mr. Pritchard stated in his 1984 affidavit that he did not bring eyewitnesses Scott and Griffin because his usual practice was to just inform management he had witnesses (J.A. 1118). However, in Mr. Pritchard's 1986 affidavit he said the reason he didn't bring eyewitnesses Scott and Griffin was that they had disciplinary problems with the Company and their credibility was substantially undermined by their records (J.A. 1118). (The alleged "disciplinary problems" turned out at trial to be matters concerning absenteeism and tardiness (J.A. 660-66, 710-21).) At trial in 1987 Mr. Pritchard said the reason he didn't bring eyewitnesses Scott and Griffin was because they told him they didn't see the incident (J.A. 1127). The eyewitnesses emphatically denied this (J.A. 680, 730, 741-42).

Hence, it can be seen that Mr. Pritchard stated four reasons in four years as to why he did not bring the eyewitnesses: (1) March 1983: he didn't want the Company to think the Union was trying to be smart or cute; (2) June 27, 1984: on occasion he brings witnesses, but his usual practice is just to inform Management he has witnesses, and as a rule he doesn't want to antagonize Management;

(3) November 1986: the witnesses had Company disciplinary problems and their credibility was substantially undermined by their records; and (4) April 1987: the witnesses told him they didn't see the incident; fear of antagonizing Management has nothing to do with his failure to produce witnesses; and he never brings witnesses to grievance meetings.

At trial, the Petitioner argued that the conflicting, ad hoc reasons given for the Union's refusal to allow the witnesses to testify indicated that these reasons were pretextual. The Petitioner contended that the real reason behind the Union's actions in refusing to allow the witnesses to be present in the initial meetings, failing to have the Business Agent represent the Petitioner in the Discharge meeting, failing to discredit Mateo, and failing to prepare for the arbitration was that the Union was not acting in good faith. These actions, the Petitioner argued, showed that the Union had, in fact, processed Petitioner's grievance in a perfunctory manner. The result was that the Petitioner was wrongfully discharged, and the Union's breach of its duty contributed to the erroneous outcome of the grievance and arbitration proceedings which upheld the discharge.

The jury was persuaded by the Petitioner's evidence that the Union had, indeed, acted arbitrarily by processing the grievance in a perfunctory manner. The jury returned a unanimous general verdict in favor of the Petitioner and against the Respondents on the issue of liability (J.A. 1321).

The judge was also persuaded that there was ample evidence in the record to support the jury's verdict. With regard to the conflicting justifications offered by the Union for failing to present the witnesses at the Discharge and Post-Discharge Meetings, the judge stated: "I heard a lot of what the jury could find would be false, exculpatory state-

ments from which a jury could easily infer hostility and bad faith." (J.A. 1179). The court denied the Respondent's motions for judgment notwithstanding the verdict or for a new trial.

The Second Circuit reversed the district court's judgment and dismissed Petitioner's complaint on the basis that there was insufficient evidence that the Respondent's Union's conduct and omissions were "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." *Barr v. United Parcel Service, Inc.*, *supra*, 868 F.2d at 43 (App. A-15--16).

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT ERRED IN APPLYING A BREACH OF FAIR REPRESENTATION STANDARD WHICH GIVES UNIONS UNLIMITED DISCRETION TO DEPRIVE INJURED EMPLOYEES OF ALL REMEDIES FOR BREACH OF CONTRACT, AND WHICH DEVIATES FROM THE STANDARD ENUNCIATED BY THIS COURT.

In *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), this Court held that a union breaches its duty of fair representation "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The Court indicated that a union acts arbitrarily when it "ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion." *Id.* at 191. In addition to the proscription against arbitrary conduct, the Court also stated that the union has an affirmative duty "to exercise its discretion with complete good faith and honesty." *Id.* at 177. Thus, the Court stated that employer and union liability could be found where "the employer has committed a wrongful discharge in breach of that [collective bargaining] agreement, a breach which could be remedied through the grievance process . . . were it not for the union's breach of its statutory duty of fair representation." *Id.* at 185.

The Court further refined the doctrine of fair representation in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Reiterating its earlier statement in *Vaca v. Sipes*, *supra*, that " 'a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion,' " the court addressed the situation, not presented in *Vaca*, where the union decides to proceed with the grievance procedure:

> It is true that *Vaca* dealt with a refusal

> by the union to process a grievance. It is also true that where the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the focus is no longer on the reasons for the union's failure to act but on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings.

Id. at 567-68.

In *Hines*, the employees had been discharged for "padding" their expense accounts by presenting inflated receipts for motel bills. *Id.* at 556. At the arbitration hearing the employer presented documents apparently showing that the reimbursement receipts exceeded the amount charged by the motel. *Id.* at 557. The employees denied any dishonesty, but neither they nor the union presented any other evidence contradicting the documents. *Id.* It was later discovered that the clerk of the motel was responsible for the discrepancy. *Id.* at 558. The employees sued the employer and the union, alleging that the union breached its duty of fair representation because "the falsity of the charges could have been discovered with a minimum of investigation." *Id.*

The Supreme Court reversed the court of appeals' determination that the arbitration award could not be overturned because "there was '[n]o evidence of any misconduct on the part of the employer.' " *Id.* at 560. The Court held that an arbitration award can be overturned if the employee shows that the employer breached the contract by wrongfully discharging the employee, and that "there is

substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings." The Court distinguished *Humphrey v. Moore*, 375 U.S. 335 (1964), where it was found that the union had not breached its duty of fair representation, stating that in *Humphrey*, the arbitral "decision was held binding on the complaining employees only after we determined that the union *had not been guilty of malfeasance and that its conduct was within the range of acceptable performance by a collective-bargaining agent.*" *Hines v. Anchor Motor Freight, Inc., supra*, 424 U.S. at 568 (emphasis added).

The Court concluded that Congress's encouragement of private dispute settlement arrangements contained in collective bargaining agreements "anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity." *Id.* at 571. Thus, the finality of an erroneous arbitral decision "is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings." *Id.*

It is significant to note that the *Hines* court found that the courts of appeals, at that time, had generally reached similar conclusions. Among the cases cited with approval by the Court was *Margetta v. Pam Corp.*, 501 F.2d 179 (9th Cir. 1974). *Hines v. Anchor Motor Freight, Inc., supra*, 424 U.S. at 572. In that case, the plaintiff had alleged that the union had breached its duty of fair representation, and "that as a direct result of the union's . . . arbitrary, discriminatory and *perfunctory representation*, plaintiff lost the arbitration case." *Margetta v. Pam Corp., supra*, 501 F.2d at 180 (emphasis added).

In the 13 years since *Hines*, however, the courts of appeals have diverged from one another, and some circuits have developed fair representation standards which deviate

significantly from the Supreme Court's pronouncements in *Vaca* and *Hines*. As the Eleventh Circuit Court of Appeals has stated: "The only thing that the federal courts seem to be in agreement on with respect to the duty of fair representation is that mere negligence is not a breach of this duty." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988).

The Eighth Circuit in several cases has addressed the "perfunctory" standard enunciated by the Supreme Court in *Vaca* and *Hines*. In *Ethier v. United States Postal Service*, 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979), the court defined perfunctory as "without concern or solicitude; indifferent" (quoting *Webster's New World Dictionary*). More recently, in *Stevens v. Highway, City & Air Freight Drivers*, 794 F.2d 376, 378 (8th Cir. 1986), the court stated that "[b]y the word 'perfunctory,' we understand the cases to mean conduct that is no more than going through the motions, involving no real effort to put forward a position."

The Seventh Circuit has stated that "[t]wo distinct categories of actionable conduct are suggested by the *Vaca v. Sipes* formulation." *Rupe v. Spector Freight Systems, Inc.*, 679 F.2d 685, 691 (7th Cir. 1982). In addition to the proscription of discrimination and bad faith, the court continued, "[t]he terms 'arbitrary' and 'perfunctory,' on the other hand, may imply a further requirement of *basic diligence*." *Id.* Similarly, it has been stated that even in the absence of discrimination or bad faith, the duty of fair representation may be violated by conduct which is so acutely perfunctory that it fails to attain a basic level of acceptable performance by a collective bargaining agent. *Hoffman v. Lonza*, 658 F.2d 519, 524 (7th Cir. 1981) (Cudahy, J., Concurring). Even among the justices in the Seventh Circuit, however, there is disagreement as to the proper standard. It now appears that the prevailing standard in the Seventh

Circuit requires a plaintiff to prove *intentional misconduct* in order to prevail in a breach of fair representation case. *Grant v. Burlington Industries*, 832 F.2d 76, 79 (7th Cir. 1987). The Seventh Circuit has gone so far as to repudiate the perfunctory standard enunciated in *Vaca* and *Hines*, holding that perfunctory conduct does not reach the level of the intentional misconduct standard applied in that circuit. *Comacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir. 1986).

The Fourth Circuit refuses to allow unions such a broad range of non-actionable malfeasance. *Dement v. Richmond, Fredericksburg & Potomac Railroad*, 845 F.2d 451, 460 (4th Cir. 1988). The court has stated that "[a] union representative could be so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members that the conduct could be equated with arbitrary action." *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980).

The Ninth Circuit has developed its own peculiar bifurcated approach in which it must first be determined whether the alleged breach is "ministerial/procedural" in nature, or whether it involved the union's judgment. *Moore v. Bechtel Power Corp.*, 840 F.2d 634 (9th Cir. 1988). Arbitrary conduct by a union is only actionable if it involves a ministerial/procedural function; when the union is deemed to exercise its judgment, the plaintiff must prove discrimination or bad faith. *Id.* at 636.

The standards applied in the remaining circuits, for the most part, do not fall neatly in line with the standards set out above. *See, e.g., Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1207 (11th Cir. 1982) (requiring "reckless disregard for the employee's rights" or conduct which is "grossly deficient"); *Ruzicka v. General Motors Corp.*, 707 F.2d 259, 260 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983)

(refusing to insulate unions from liability for "good faith errors"); *NLRB v. Local 282, International Brotherhood of Teamsters*, 740 F.2d 141, 148 (2d Cir. 1984) (requiring conduct which is "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary").

It is clear that there is little common ground among the circuits, and it is equally clear that some circuits have abandoned the standard articulated in *Vaca* and *Hines* and the reasoning behind the standard. The result is that, in some circuits, "the worker [has] only an ephemeral right to sue his union for breach of its duty of fair representation." *Vaca v. Sipes*, *supra*, 386 U.S. at 210 (Black, J., dissenting). What the *Vaca* court denounced as contrary to the intent of Congress has come to fruition: The courts in some circuits have "conferr[ed] upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." *Id.* at 192. As this Court has noted, "the subject matter of § 301 is 'peculiarly one that calls for uniform law.' " *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). This proposition is especially true in cases which involve "the formation of the collective agreement and *the private settlement of disputes under it*." *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966). Therefore, it is imperative that the Court take this opportunity to clear up the confusion over the proper standard applicable to the unions' duty of fair representation.

In *Barr v. United Parcel Service, Inc.*, 868 F.2d 36 (2d Cir. 1989), the court applied a standard which allows unions to act with impunity so long as the employee is unable to present direct proof of an evil motive on the part of the union. Although the plaintiff had argued in the district court that his claim was based, inter alia, on the union's "perfunctory" processing of his grievance, the court of ap-

peals refused to recognize the perfunctory standard. *Id.* at 43, App. at A-15--16. The court stated that to prove a breach of the duty of fair representation the union's actions must have "amounted to conduct and omissions 'so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.' " *Id.* (quoting *NLRB v. Local 282, International Brotherhood of Teamsters*, *supra*, 740 F.2d at 147).

The court also added an additional obstacle, stating that any action which the union asserts was a "tactical" decision cannot serve as the basis for a breach of its duty. *Id.* The apparent broad sweep of this doctrine protects the union from a failure to investigate a grievance, a failure to prepare for hearings and arbitrations, a failure to attack weak evidence presented by the employer, and a failure to present exculpatory evidence and witnesses. Thus, a union which processes a grievance in a perfunctory manner, with no concern for the outcome, can later escape liability for a breach of its duty by offering the ad hoc explanation that its actions were "tactical" in nature.

Under the Second Circuit's reasoning in *Barr*, the Union's assertion that its actions were motivated by tactical considerations is not susceptible to attack by the Plaintiff. Before and during the trial in district court the Union offered various conflicting reasons for its refusal to allow the witnesses at the Division Manager Discharge Meeting and the District Manager Post-Discharge Meeting (J.A. 1109-19; *Barr v. United Parcel Service, Inc.*, *supra*, 868 F.2d at 44, App. at A-17--18). At trial, the Petitioner argued that the conflicting, ad hoc reasons given for the Union's refusal to allow the witnesses to testify indicated that these reasons were pretextual. The Petitioner contended that the real reason behind the Union's actions in refusing to allow the witnesses to be present in the initial meetings, failing to have the Business Agent represent the Petitioner in the

Division Manager Discharge Meeting, failing to discredit Mateo, and failing to prepare for the arbitration was that the Union was not acting in good faith. These actions, the Petitioner argued, showed that the Union had, in fact, processed Petitioner's grievance in a perfunctory manner, without concern for the outcome.

Although the court purports to apply a standard whereby unions will not be liable to "employees who may be prejudiced by rationally founded decisions which operate to their particular disadvantage," *id.*, the court accepts without analysis the Union's contention that its decisions are rational. Is it rational to fail to interview the grievant or witnesses or prepare for final arbitration until 35 minutes before the arbitration hearing? Is it rational for a union faced with a credibility issue, i.e., Mateo v. Barr, to refuse to present evidence that Mateo had an ulterior motive or an axe to grind? Is it rational to withhold critical and exculpatory eyewitnesses from management on two occasions before and after discharge in light of the known seriousness of the charges? Clearly, the court of appeals was not, in fact, requiring any degree of rationality from the Union's assertedly "tactical" decisions.

Without discussing why the jury could not conclude from this evidence that the tactical justification was a pretext for the Union's failure to process the complaint in good faith, the court of appeals stated that "[n]one of the evidence adduced at trial . . . detracts from our conclusion that any errors Local 804 might have made were of a tactical nature." *Id.*, App. at A-17. The court held that the evidence was insufficient to support a verdict that the Union breached its duty of fair representation and vacated the judgment of the district court.

With the court of appeals' decision in *Barr* the Second Circuit has moved further away from the Supreme Court's

rulings in *Vaca* and *Hines*, and closer to the Seventh Circuit's repudiation of the perfunctory standard articulated in those decisions. The court of appeals has essentially eliminated any duty of good faith or diligence on the part of the union, leaving only a proscription against bad faith or discriminatory conduct. Furthermore, the Second Circuit's recognition of an absolute shield from liability for any action which the union asserts was a tactical decision, will require future plaintiffs to show direct evidence of a union's evil motive in order to prevail.

It is well established in Supreme Court precedent that a union may be liable for ignoring a meritorious grievance or processing a grievance in a perfunctory manner. *See Vaca v. Sipes*, *supra*; *Hines v. Anchor Motor Freight, Inc.*, *supra*; *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 165 (1983). Certainly in *Hines* the union had no evil motive, but rather the union had so little concern for the outcome of the grievance that it failed to uncover easily discoverable exculpatory evidence and failed to attack the obviously flawed evidence presented by the employer. The standard advanced by the court of appeals in *Barr* is a significant departure from these precedents, and is in derogation of the policy underlying the duty of fair representation.

The Second Circuit's decision in *Barr* is also in conflict with decisions in other circuits as well as decisions within the Second Circuit itself. *See Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), *modified on other grounds*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) (finding breach of duty of fair representation where union failed to challenge constitutionality of company rule forbidding false and malicious statements about the firm, and finding that union attorney failed to vigorously argue unconstitutionality of rule "probably because of inadequate preparation," 381 F. Supp. at 199-200); *see also Banks v.*

Bethlehem Steel Corp., 870 F.2d 1438 (9th Cir. 1989) (issue of fact existed regarding union's breach of duty where union failed to use exculpatory witness assertedly because of union rule prohibiting one union member to "knowingly wrong" another).

In *Barr*, the Second Circuit has applied a standard which is contrary to the standard established by this Court, conflicts with decisions in other circuits as well as the Second Circuit itself, and undermines the policy behind the union's duty of fair representation. Furthermore, the confusion surrounding the proper standard to be applied in these cases is apparent in every circuit. Therefore, this case calls for an exercise of this Court's power of supervision.

II. THE APPELLATE COURT FAILED TO APPLY THE PROPER STANDARD FOR RULING ON A MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT.

In *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933), Justice Brandeis cautioned that "[a]ppellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's verdict." Moreover, it is well established that the weight of the evidence and the credibility of witnesses is solely within the province of the jury. *A & G Stevedores v. Ellerman Lines*, 369 U.S. 355, 358-59 (1962); *Lavendar v. Kurn*, 327 U.S. 645, 652-53 (1946).

On reviewing a denial of a motion for judgment notwithstanding the verdict, the appellate court is required to perform essentially the same function the trial court per-

formed when ruling on said motion. *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 951 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982). The appellate court is obliged to consider all the evidence in the light most favorable to the successful party below, to resolve all conflicts in the evidence in favor of the prevailing party, to refrain from assessing the credibility of witnesses or weighing the evidence, and not substitute its judgment for that of the jury. *Grogan v. General Maintenance Service Co.*, 763 F.2d 444 (D.C. Cir. 1985); *see also, e.g., Locrichio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987); *Spanish Action Committee of Chicago v. City of Chicago*, 766 F.2d 315 (7th Cir. 1985); *Mattivi v. South African Marine Corp.*, 618 F.2d 163, 167 (2d Cir. 1980). The court does not determine whether a jury could have reached a different verdict, but whether there is substantial evidence for the verdict that it reached. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Shatterproof Glass Corp. v. Libbey-Owens Ford Co.*, 758 F.2d 613 (Fed. Cir.), *cert. dismissed*, 474 U.S. 976 (1986).

In *Lopez v. McLean Trucking Co.*, 798 F.2d 611 (2d Cir. 1986), the court stated the appropriate standard of review as follows:

> The district court's denial should be overturned only when, viewing the evidence in the light most favorable to the nonmoving party,
>
> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded

> men could not arrive at a verdict against him.
>
> *Mattivi v. South African Marine Corp.*, 618 F.2d 163, 168 (2nd Cir. 1980).

Id. at 614.

In the case at bar, the court of appeals neither articulated nor applied the proper standard of review. Although the court based its holding on its finding that "insufficient evidence exists to support Barr's claim," it is clear that the court weighed conflicting evidence, made its own credibility determinations, and refused to view the evidence in the light most favorable to the Petitioner. The court did not inquire as to whether the evidence was sufficient to support the jury's verdict, but rather concerned itself with *the conclusion it would have reached* based on the court's assessment of the evidence.

For example, the court states that "[n]one of the evidence adduced at trial . . . detracts from *our conclusion* that any errors Local 804 might have made were of a tactical nature." *Barr v. United Parcel Service, Inc.*, *supra*, 868 F.2d at 43, App. at A-17 (emphasis added). The role of the court, however, was not to reach its own conclusion and search for evidence which might detract from it. On the contrary, the court's role was to determine if, viewing the evidence in the light most favorable to the nonmoving party, there was evidence to support the verdict.

In reaching *its conclusion* the court apparently overlooked or re-weighed much of the evidence on which the jury relied in reaching the conclusion that the union had acted arbitrarily. The court states, for instance, that union agents interviewed one of the witnesses prior to the Division Manager meeting. *Id.* at 39. The testimony of the

witness, however, was to the contrary (J.A. 693-94). The court also states that a union agent spoke to both witnesses before the Division Manager meeting, and that they denied having seen anything. *Id.* at 40, App. at A-8. Both witnesses denied that they had even been contacted by union agents until after the Petitioner's discharge, and both witnesses said they saw the Petitioner show the contents of the flat paper bag to Mateo (J.A. 650, 693). These were contested issues of fact in the trial, and turned largely on credibility determinations. The court clearly erred in making its own credibility determinations on these issues.

On a crucial point of contested evidence, the court literally accepted at face value the union's contention that it had a policy "not to present witnesses at the earliest stages of a grievance," *id.* at 44, App. at A-17, and that the union was acting pursuant to this policy when it refused to allow the witnesses to be present or to allow company officials to interview the witnesses. The Union had given many conflicting reasons why the witnesses were not allowed to testify. At trial Union Business Agent Pritchard testified that he never brings witnesses to grievance meetings (J.A. 1109). However, in his June 27, 1984 affidavit, he said on occasion he did bring witnesses to grievance meetings (J.A. 1110). At various times, Pritchard gave wholly different reasons for not allowing the witnesses to be present: unwillingness to antagonize management (J.A. 1111-12); alleged disciplinary problems with the witnesses—which turned out to involve relatively nominal matters such as tardiness (J.A. 1118, 660-66); and, that they had not seen the incident (J.A. 1127).

At trial, the Petitioner argued that the conflicting, ad hoc reasons given for the Union's refusal to allow the witnesses to testify, indicated that these reasons were pretextual. The Petitioner testified that the real reason behind the Union's actions in refusing to allow the witnesses to be

present in the initial meetings, was that the union was not concerned with the outcome of his grievance. The Petitioner pointed to numerous other actions by the Union from which the jury could reasonably infer that this was the case. It was obviously erroneous for the court of appeals to ignore evidence presented by the Petitioner in favor of discredited evidence presented by the Union.

These examples clearly show that the court of appeals applied an erroneous standard of review. The court refused to credit the testimony of the witnesses at the arbitration who stated that they had not been contacted by the Union prior to the Division Manager meeting. The court credited the contradicted testimony of Union agents who stated that the witnesses had denied seeing the incident for which Petitioner was discharged. And the court reweighed conflicting evidence regarding the Union's alleged policy of not presenting witnesses at the earlier stages of a grievance.

The court also erroneously found an "unresolved dispute" over the prior telephone incident between Barr and Mateo. However there is no unresolved dispute. Barr testified at trial that the incident happened (J.A. 521-23) and Mateo admits the incident happened (J.A. 825). This trial evidence was crucial to show that the Union's failure to introduce the telephone incident at the arbitration failed to give the arbitrator evidence of Mateo's "axe to grind" or "an ulterior motive" in determining the credibility of witnesses. Union agent Pritchard testified at trial that he did not know of the prior Barr/Mateo telephone incident but had he known of it he would want the arbitrator to know of it (J.A. 1134-35). There was evidence at trial that he knew or should have known of it (J.A. 866), and certainly if the Union lawyer had prepared for the arbitration more than 35 minutes this significant failure would not have resulted. Hence the jury's verdict was based on sufficient evidence

of the Union's breach of its duty of fair representation and should not have been disturbed by the Second Circuit panel. Instead of being "slow to impute to [the] jur[y] a disregard of [its] duties," however, the court of appeals refused to give the trial court decision any deference whatsoever. Therefore, the decision of the court of appeals should be reversed.

CONCLUSION

For the foregoing reasons, the Petitioner, Joe L. Barr, respectfully requests this Court to grant this petition and issue a writ of certiorari to the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 23, 24--August Term 1988

Argued: September 13, 1988
Decided: February 10, 1989
Docket Nos. 88-7230, 88-7244

JOE L. BARR, a/k/a JOSEPH L. BARR,
Plaintiff-Appellee (re: 88-7230),
-against-
UNITED PARCEL SERVICE, INC., and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants,
LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant-Appellant (re: 88-7230),
UNITED PARCEL SERVICE, INC.,
Defendant-Appellee (re: 88-7230).

JOE L. BARR, a/k/a JOSEPH L. BARR,
Plaintiff-Appellee (re: 88-7244),
-against-
UNITED PARCEL SERVICE, INC., and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants,
UNITED PARCEL SERVICE, INC.,
Defendant-Appellant (re: 88-7244).

Before:

LUMBARD and MAHONEY, Circuit Judges, and CHOLAKIS, District Judge.

United Parcel Service (UPS) and Local 804 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America appeal from a jury verdict in the District Court for the Eastern District of New York ordering the reinstatement of Joseph L. Barr, who was employed by UPS until his discharge for breach of a security regulation, and awarding him back pay. UPS and Local 804 contend that Barr presented insufficient evidence of a breach by Local 804 of its duty of fair representation for that issue to have been submitted to the jury.

Reversed; complaint dismissed.

RICHARD N. GILBERG, New York, N.Y. (Cohen, Weiss and Simon, New York, N.Y., Susan Davis, Earl R. Pfeffer, of counsel), for Local 804 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

HAROLD J. JOHNSON, Brooklyn, N.Y. (Flamhaft Levy Kamins Hirsch & Booth, Brooklyn, N.Y., of counsel), for Joe L. Barr.

JEFFREY A. MISHKIN, New York, N.Y. (Proskauer Rose Goetz & Mendel-

sohn, Mary Ruth Houston, New York, N.Y., of counsel), United Parcel Service, Inc.

LUMBARD, Circuit Judge:

This is an appeal from a judgment entered on a jury verdict in the Eastern District of New York, Charles P. Sifton, Judge, ordering Joseph L. Barr's reinstatement and awarding him back pay in his suit against his former employer, United Parcel Service, Inc. (UPS) for wrongful discharge, and his labor union, Local 804 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 804), for having violated its duty of fair representation under LMRA 301. The district court apportioned the stipulated back pay damages by holding UPS liable in the amount of $2,482.48 and Local 804 liable for the balance of $83,349.82. The principal contention of UPS and Local 804 is that there was insufficient evidence of a breach of Local 804's duty of fair representation for that claim to go to the jury. We agree, and accordingly we vacate the verdict and dismiss Barr's complaint.

I.

A. The March Incident

The events which culminated in this appeal took place at UPS's package sorting facility in Maspeth, Queens, New York, at about 3:50 a.m. on March 1, 1983. Barr, a package sorter who had worked for UPS for fourteen years, allegedly failed to produce a package in his possession for a security inspection when he was leaving the plant after his 5:45 p.m. to 2:45 a.m. shift. UPS maintains security checkpoints at the exits of its Maspeth plant to prevent thefts by its employees of parcels in its care; a UPS rule, published and in effect for several years and which had been reaf-

firmed by a posted notice on February 11, 1983, provided that "[e]mployees exiting the building with any bags, attache cases, etc., must open them for inspection by the guard on duty." The rule explicitly stated that an employee's failure to comply with this procedure might result in his or her discharge.

The evidence we summarize was formally presented first at the arbitration hearing at which Barr's discharge was upheld and again, de novo, at trial. Although the parties have quite different versions of the events at the security checkpoint on March 1, the evidence adduced at trial is generally consistent with that presented at the arbitration hearing.

Barr's version is that when he passed the checkpoint, he displayed to Siro Security Guard Antonio Mateo the contents of the 11-1/2 by 14 inch flat brown paper bag which he was carrying. (UPS retained Siro Security to provide security services at the Maspeth facility.) Barr testified, both at the arbitration hearing and at trial, that he had taken the then-empty paper bag from his locker in the plant and had placed several dental insurance forms inside. He then met two co-workers, Harold Griffin and Johnny Scott, whom he had agreed to drive home. As the three men passed Mateo, Mateo asked Barr to show him the contents of the bag. Barr alleges that he removed the dental forms from the bag, inverted it and shook it to show that it was empty, replaced the forms inside the bag and walked past Mateo and out of the plant. He heard Loss Prevention Clerk James R. Albert (whose name Barr did not know at the time) say "Hey buddy" in Barr's direction when Barr was about six car lengths from the UPS main gate. He then turned around, and Albert accused him of having failed to show his bag to Mateo. Barr replied that he had shown Mateo the bag, and he alleges that he showed it to Albert as well, by removing the forms and

shaking the bag in the same manner as before. He then got in his car and departed; Albert wrote down the license plate number of the car and reported the incident. Barr further alleges that an unidentified supervisor drove alongside of his car while he was waiting for it to "warm up" and asked what had happened. Barr told this supervisor that a guard had asked him about his bag and that he had shown the guard its contents. The supervisor then drove away.

Mateo's recollection was quite different. He testified that, when he asked Barr (whom he alleges he did not know) to permit him to examine the bag, Barr responded "no" and kept walking through the gate with one companion, whom Mateo also did not know. Mateo went immediately to the nearby Loss Prevention office and told Albert what had happened. Mateo and Albert went outside, where Albert then confronted Barr. Mateo and Albert then went back inside the plant, where Mateo signed a statement to the effect that he had seen an employee exit the plant, had asked to see his bag, had been refused and had reported the incident to Albert.

Albert, who had worked part time for over five years in the UPS loss prevention office, alleged that Mateo reported the incident at the gate to him at 3:50 a.m. on March 1 and that the two of them then went outdoors, where Mateo pointed out Barr and one other employee. Albert asserts that, when he identified himself to Barr, Barr asked him if he wanted to look into the bag and partly removed some papers from the bag. Albert declined to inspect the bag (it apparently being "too late," since the men were outdoors and the rule requires that bags be inspected inside the plant). Albert says that he then returned to the plant, spoke with Mateo and prepared statements for himself and Mateo to sign.

Barr called Griffin and Scott, the two men whom he drove home after their shift on March 1, as witnesses at both the arbitration and the trial to corroborate his version of the incident that had occurred at the security checkpoint. Both Griffin and Scott testified that Barr had displayed the contents of his bag to Mateo as the three men passed the checkpoint. Griffin's and Scott's recollections of the scene were essentially identical to Barr's, except that Griffin did not hear the exchange at the checkpoint between Barr and Mateo. Although Barr, Griffin and Scott allege that all three of them passed the checkpoint together, Mateo and Albert claim to have seen only one other man with Barr.

B. The Grievance Procedure

This case concerns the events that took place after the March 1 incident. Barr alleges, and the jury found, that Local 804 violated its duty fairly to represent Barr in the various steps in the dispute resolution process that was set in motion by the incident at the gate. In order to assess these claims, we relate, in some detail, the actions Local 804 took on Barr's behalf.

Barr's complaints about the union's alleged violation of its duty must be analyzed in the context of the provisions of the collective bargaining agreement between UPS and Local 804. Article 20 of that agreement, in effect at all relevant times between UPS and Local 804, governs the resolution of disputes and provides a step-by-step process for grievances, with binding and final arbitration the last step. When UPS and an employee have a dispute, the complaining party shall bring the grievance to the attention of the shop steward (an employee who is also a union officer) on the employee's shift, in what is termed a "Step 1" meeting. In cases which involve employee discipline, the matter first comes to the union's attention when the supervisor in charge notifies the shop steward of the rule viola-

tion. If the shop steward, the employee and the supervisor are unable to resolve the problem within one day after the Step 1 meeting, a Step 2 meeting is held. At this step, an officer of the union refers the matter to a division manager or other executive officer of the company, who is to render a decision within five days of the referral. If the grievance is not resolved at the Step 2 stage, the parties submit the matter to binding arbitration.

On the morning of March 1, 1983, immediately after the events at the security gate, UPS Company Manager Steve Ruggerio informed Al Henley, a shop steward on the 9 p.m. to 7 a.m. shift, what had happened at the gate and told him that UPS had a disciplinary claim against Barr. Since Barr had left the plant immediately after the incident, Henley was unable to locate him before he left the plant at 7 a.m., and therefore he telephoned John Brown, a shop steward on the 12:45 p.m. to 9:45 p.m. shift, when he got home. Henley told Brown what little he knew about the incident, and Brown agreed to investigate the complaint and speak to Barr that day.

The parties agree that both Henley and Brown knew how serious the charge against Barr was and that it could result in his discharge; besides having been shop stewards for 15 years, they both knew of a similar case that occurred several months previously, in which one Jeffrey Jones, who had allegedly refused to show his bag to the guards upon exiting the plant, was discharged. Henley had represented Jones in that matter, in which the arbitrator upheld the discharge.

When Brown got to the plant that midday, he initiated an investigation by speaking to several employees on Barr's shift to see if they had heard anything about the Barr incident. None had, according to Local 804, but one employee did suggest that Brown talk to Griffin (one of Barr's wit-

nesses). Brown did so, and also talked to Barr when Barr arrived for his shift that evening. Testimony at trial elicited the fact that Barr reacted with surprise and professed lack of knowledge when he was first told that UPS might have a charge against him; both Barr and Griffin apparently claimed at first to have no idea to what Brown was referring. When Henley arrived for his shift, Brown spoke to him about developments in the case. Henley then met with Barr, who again denied having had any trouble with the security guard.

1. The Step 1 Meeting

Later that night (the night of March 1 and 2, 1983), UPS Division Manager Jim McGinn told Henley that UPS planned to call a Step 1 meeting about the incident. Henley testified that he then spoke again with Barr, saying "you better let me know" what had happened. Barr at this time first related his story to Henley: He had shown the bag contents to Mateo, the contents were the dental benefit claim forms, Griffin and Scott had witnessed Barr showing Mateo the bag and contents, and Barr had shown the bag again to Albert and had spoken to a supervisor afterwards. Henley then spoke immediately with Griffin and Scott, both of whom denied having seen anything.

Because Mateo was not at work that night, the Step 1 meeting was put off until the next night; Barr worked his shift ending at 2:45 a.m. on March 2 without further discussion of the charge.

On March 2, Local 804 Business Agent Bill Pritchard, who was at UPS's Maspeth facility that afternoon spoke with Brown and Henley about Barr's case. Henley told Pritchard about the cancellation of the Step 1 meeting the night before, and Pritchard advised Henley to request a 72-hour notice on Barr's behalf at the meeting, which had been rescheduled for the night of March 2 and 3. (A 72-

hour notice, as defined in the collective bargaining agreement, delays any disciplinary action taken by UPS for three days after the Step 1 meeting so that Local 804 can investigate further. The delay may be demanded in any case except those involving admitted or proven dishonesty or drinking.) Pritchard also advised Henley that it would not be a good idea to take Griffin and Scott to the Step 1 meeting, because, the union claims, it is not union practice to present witnesses at grievance meetings short of arbitration and because, in Pritchard's opinion, Barr himself, a longstanding employee with a clean record, would be more persuasive than his witnesses, both of whom had had disciplinary problems at UPS in the past.

Later that night, UPS Division Manager David Donnelly, who had taken over the Barr matter from McGinn, called a Step 1 meeting for midnight on March 2. Present at the meeting were Barr, Henley, Donnelly, Mateo, Albert and Loss Prevention Manager James Tobin. Donnelly informed Barr of the charge against him. Mateo, Barr and Albert then described their versions of the events; Barr and Henley both physically demonstrated Barr's version of what had happened. Henley and Barr disagree about whether a prior incident between Mateo and Barr (summarized *infra*) was discussed. Henley testified that he did not know then about that incident, but Barr alleges and Donnelly testified that it was mentioned briefly; Donnelly testified that it was not a factor in his decision.

Donnelly discharged Barr at the Step 1 meeting, citing "breach of security" as the reason. He refused Henley's request for a 72-hour notice of discipline and also took the position that Henley's production of Barr's witnesses would not change his opinion.

Barr alleges several breaches of Local 804's duty at the Step 1 meeting. He asserts that his witnesses should have

been called at the Step 1 meeting. He also claims that the union did not, during the 45-hour period between UPS's notice that charges would be brought against Barr and the Step 1 meeting, act swiftly enough or with sufficient vigor to prepare for the meeting. It was not enough, Barr argues, for Local 804 to have merely conducted several interviews prior to the meeting.

Barr does not dispute that Henley represented him fairly at the Step 1 meeting. Rather, he asserts that Pritchard should have represented him from the start. He argues that it was his "understanding" that Pritchard would be present at the Step 1 stage; Local 804 responds that it is the written policy of the union to have shop stewards represent employees at the first stage of the grievance process.

2. The Step 2 Meeting

Immediately after the Step 1 meeting and Barr's discharge, at 1:15 a.m. on March 3, Henley telephoned Pritchard at home. Pritchard, in accordance with Local 804's practice, took over the case, and elected to proceed to Step 2; he arranged for a Step 2 meeting to be held on March 7 with UPS District Manager Thomas Petley.

At the Step 2 meeting, attended by Petley, Donnelly, Pritchard, Henley and Barr, Barr again demonstrated what he claimed had happened on March 1. Pritchard then spoke on Barr's behalf, mentioned Barr's witnesses and attempted to distinguish Barr's case from the Jones matter, in which the discharged employee admitted having left the plant without having opened his bag. Barr's witnesses were not present at the meeting, nor were Mateo or Albert. However, Pritchard testified that he spoke to Petley alone after the meeting, again raising the differences between Barr's case and the Jones matter and again offering to present Barr's witnesses, but that Petley was uninterested in Pritchard's further arguments and implied that

Donnelly's decision to discharge Barr would be sustained. On March 9, Petley upheld the discharge.

Barr's complaints about Local 804's conduct before and during the Step 2 meeting are similar to those he voices concerning Step 1. He maintains that Local 804's continuing failure to call Scott and Griffin at the informal meeting stage of the grievance procedure, or at least to request that Petley interview them, manifested a breach of its duty. As additional errors on Local 804's part, Barr points to the union's failure to require that Mateo attend the Step 2 meeting and that Pritchard, having failed to meet with Barr prior to the session, was ill-prepared and argued unforcefully, presenting only nondescript evidence with the thrust that Barr was "a good employee" and had "never had a problem with anybody."

3. The Arbitration Hearing

The dispute went to arbitration on March 14, 1983 before Arbitrator Arthur Stark of the American Arbitration Association, as provided by the collective bargaining agreement. Prior to the hearing, Pritchard reviewed the case with Local 804's attorney, Stanley Berman, and also convinced Griffin to testify as a witness. On the day of the hearing, Pritchard and Berman met for about a half hour with Barr, Scott, Griffin, Henley and Shop Steward John Callan.

At the arbitration hearing, Barr testified that he had shown the contents of his bag to Mateo and demonstrated his testimony, Griffin and Scott corroborated Barr's story, and Pritchard testified on Barr's behalf. Counsel for UPS called Mateo and Albert.

By opinion dated April 7, 1983, Arbitrator Stark upheld Barr's discharge. In his opinion, Arbitrator Stark summarized the testimony of Barr, Mateo, Albert, Scott, and

Griffin. (Their testimony at the hearing was substantially identical to their testimony at trial.) Arbitrator Stark then compared Barr's case to the arbitration in the Jeffrey Jones case. The Jones incident, which similarly involved a breach of the package inspection rule, also involved security guard Mateo. The arbitrator in the Jones case had found Mateo to be a credible witness. Using that precedent, Arbitrator Stark likewise credited Mateo's testimony over Barr's, finding that Mateo had no history of making frivolous charges, that he had no "ulterior motive" and that he had clearly seen Barr pass his station and would have seen Barr invert and shake the bag had Barr done so.

Barr claimed, and Local 804 argued at the hearing, that the Jones case was distinguishable because Jones admittedly had failed to show the contents of his bag to Mateo, whereas Barr maintained vehemently that he had complied with the rule. Arbitrator Stark nevertheless found the Jones matter to be controlling and ruled that discharge was the appropriate remedy once the veracity of the security guard's testimony had been ascertained.

Finally, in response to Local 804's argument that a penalty short of discharge was called for given the residual doubt that Barr had indeed violated the rule, Arbitrator Stark wrote that, had such doubt existed in his mind, he would have ordered that Barr be reinstated. A "deliberate flouting" of a rule so important to UPS's security, he wrote, demands a penalty no less severe than termination.

Barr alleges that three serious omissions on the part of Local 804 seriously prejudiced his case before the arbitrator. First, he alleges that Local 804 did not adequately prepare for the arbitration hearing. He maintains that brief meetings with Berman, union personnel, the witnesses and Barr himself were insufficient preparation for a hearing involving Barr's livelihood. Had Berman been bet-

ter prepared, Barr claims, he would have found that to make a fair effort on Barr's behalf would have required him to present evidence concerning an alleged UPS policy to replace senior full-time employees with less expensive part-time workers and at least some testimony from Henley, the union official closest to Barr and the incident.

Second, Barr claims that Local 804 should have offered evidence at the arbitration concerning a prior incident between Barr and Mateo, which evidence Barr maintains would have proven that Mateo had an "ulterior motive" and hostile intent. On February 17, 1983, several weeks prior to the incident giving rise to his discharge, Barr claims, he had promised UPS Company Supervisor James Gummer a ride home after the shift ending at 3:45 a.m., and they had planned to meet at the end of the shift at the same gate that Barr exited through on March 1. When Gummer did not appear at the appointed time, Barr asked Mateo whether he could use the telephone at the security desk to call Gummer; Barr alleges that Mateo's response was, "You're not going to use the m--- f--- phone," and that, to Barr's suggestion that he would ask to use the telephone in the security office, Mateo answered, "You're not going to use that m--- f--- phone either." The dispute over whether this incident ever occurred was not resolved; Mateo has claimed throughout the proceedings that he did not recognize Barr on March 1. Barr alleges, however, that had Local 804 presented evidence of this prior incident at the arbitration hearing (which evidence would likely have been limited to Barr's testimony), Arbitrator Stark would have found that a reason existed to discredit Mateo's testimony and quite possibly would have found for Barr. Local 804's failure to present such strong exculpatory evidence, in Barr's view, constituted a breach of its duty of fair representation.

Third, Barr alleges that Local 804 failed to raise the

issue of whether UPS was intentionally "setting up" full-time employees with seniority so that it could discharge them and replace them with less costly part-time workers. Barr now alleges complicity by Local 804 in this endeavor.

C. Barr's District Court Complaint

Barr filed suit in the Eastern District on October 5, 1983, alleging that the numerous improprieties in Local 804's representation of him had led to the erroneous upholding of his discharge at arbitration. His complaint alleged (1) that UPS had wrongfully discharged him pursuant to its unlawful policy of discharging senior workers in order to replace them with part-time, less expensive employees; (2) that Local 804 made certain decisions regarding Barr's case in bad faith; (3) that Local 804 and UPS were in collusion with respect to the employee replacement objective referred to above; and (4) that Local 804 thereby violated its statutory duty of fair representation under 301 of the Labor Management Relations Act (29 *U.S.C.* § 185). He demanded reinstatement and damages of one million dollars, apportioned between UPS and Local 804 in proportion to their respective shares of the liability.

The case went to trial on April 14, 1987, before a jury, which returned a verdict for Barr on April 22, 1988. Based on the parties' stipulation that Barr's damages in terms of lost wages amounted to $83,349.82, Judge Sifton, on May 19, 1987, held UPS primarily liable for $2,482.48 and Local 804 primarily liable for the remaining $85,832.30, with prejudgment interest to be paid in the same ratio. This apportionment accords UPS liability for Barr's pay for the period from his discharge until that point at which Local 804's breach of its duty of fair representation shifted the liability to it. The court also awarded attorneys' fees against Local 804 only. The final judgment also ordered that UPS reinstate Barr with full pay and no loss of seniority.

Both Local 804 and UPS moved for judgment notwithstanding the verdict in December 1987, which Judge Sifton denied on February 9, 1988.

On appeal, Local 804 and UPS argue that Local 304 did not violate its duty of fair representation and, therefore, that the arbitrator's ruling may not be disturbed. They additionally argue that Judge Sifton erred when he submitted the fair representation claim to the jury and that he incorrectly charged the jury on that issue. Finally, Local 804 contends that the apportionment of damages is improper.

II.

Because we find that insufficient evidence exists to support Barr's claim that Local 804 breach its duty of fair representation, we agree with Local 804 and UPS that Arbitrator Stark's award may not be disturbed. Accordingly, we vacate the judgment of the district court and dismiss Barr's complaint.

Barr alleges that Local 804 violated its duty of fair representation by its specific actions and inactions during the grievance procedure. He alleges that Local 804's decisions in its representation of him amounted to bad faith and perfunctory processing of the challenge to his discharge. While each of the specifically alleged breaches may, with the benefit of hindsight, be viewed as a possible tactical error by Local 804, none of them, taken either singly or collectively, are nearly sufficient to make out a prima facie case that Local 804 breached its duty fairly to represent Barr. As for the alleged conspiracy between UPS and Local 804, we find no evidence whatever to support Barr's allegations.

In order to have prevailed against the union, Barr would have had to show either that the conspiracy existed

or that these tactical decisions, none of which were circumscribed by either the collective bargaining agreement or Local 804's own rules and procedures, amounted to conduct and omissions "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." *N.L.R.B. v. Local 282, International Brotherhood of Teamsters*, 740 F.2d 141, 147 (2d Cir. 1984) (quoting *Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082, 1089-90 (9th Cir. 1978)). Absent such a showing, the award of an arbitrator whose decision the parties have contractually agreed will be final may not be disturbed. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 163-65 (1983).

Two elements must be proven for a breach of the duty of fair representation claim: The union's conduct must, first, have been "arbitrary, discriminatory or in bad faith," *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and second, it must have "seriously undermine[d] the arbitral process." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). The evidence presented was not sufficient to support a verdict that the union failed to fulfill its duty of fair representation in keeping with these standards.

Barr contends that Local 804 was acting in complicity to UPS in UPS's efforts to reduce the proportion of full-time employees with seniority in its workforce. Accordingly, Barr alleges, Local 804 only perfunctorily went through the motions of contesting his discharge through arbitration. In our review of the evidence adduced at the arbitration and at trial, we find not a scintilla of evidence to support this assertion.

Barr argues that Local 804 acted arbitrarily and in bad faith when it refused to present Barr's witnesses at the Step 1 or Step 2 meetings and by failing both to prepare adequately for the meetings and the arbitration hearing and to

have Pritchard represent Barr from the outset. While these decisions might conceivably have affected the outcome of the arbitration, they indubitably do not rise to the level of bad faith and arbitrariness. In hindsight, any decision a union makes in the informal yet complex process of handling its members' grievances may appear to the losing employee to have been erroneous. The decisions taken here by Local 804 were tactical in nature. At most, they may have been errors of judgment. In any event, they were not so egregious as to be evidence of bad faith and failure fairly to represent Barr.

Tactical errors are insufficient to show a breach of the duty of fair representation; even negligence on the union's part does not give rise to a breach. "[P]roof of mere negligence or errors of judgment . . . is insufficient. . . . 'As long as the union acts in good faith, the courts cannot intercede on behalf of employees who may be prejudiced by rationally founded decisions which operate to their particular disadvantage.' " *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 645 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986) (quoting *Capobianco v. Brink's Inc.*, 543 F. Supp. 971, 975 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983)). None of the evidence adduced at trial concerning Barr's allegations of specific failings of Local 804 detracts from our conclusion that any errors Local 804 might have made were of a tactical nature.

Local 804's practice is not to present witnesses at the earliest stages of a grievance. Although the reason for this policy is unclear--some testimony indicated that the practice was adhered to for the tactical purpose of avoiding appearing too adversarial in the early stages, while other witnesses at trial testified that the union could not be sure at that early stage whether the witnesses had in fact seen the incident--Barr proffered no evidence (other than the fact that this discharge was eventually sustained) to indicate

that Local 804's decision not to present Griffin and Scott until the arbitration hearing was motivated by anything other than strategy. In fact, Barr did not complain to Henley or to Pritchard about their handling of the Step 1 and Step 2 meetings; the UPS officials at both of those meetings indicated to Henley and Pritchard that the witnesses' testimony would not have swayed them. Moreover, the union's decision had some support in its previous experiences in such matters and the records of the two witnesses. Barr was a senior employee with a good work record; both Scott and Griffin had blemishes on their records. There was no evidence of bad faith in Local 804's decision to save the witnesses' appearances for the arbitration hearing.

Similarly, we find no evidence to support the assertion that Pritchard should have become involved earlier. Local 804's written practice was to have shop stewards represent employees at Step 1 meetings. Despite Barr's "understanding" that business agents commonly represented employees at Step 1 meetings, nothing at trial supported the proposition that Local 804 failed competently and fairly to represent him at each stage of the grievance procedure.

As for the decisions concerning the witnesses to be presented at the arbitration hearing, we likewise can find no evidence that Local 804's conduct approached that which was faulted in *Vaca* and *Hines*. Barr offers no rationale for his assertion that Henley's failure to testify at the arbitration amounted to bad faith. With respect to the telephone incident between Barr and Mateo on February 17, 1983, there is little reason to believe that Local 804 would have found it helpful to raise the incident at trial. It was reasonable for Berman to have decided that evidence about that incident would not advance Barr's cause.

Finally, we disagree with Barr's assertion that Local 804 violated its duty of fair representation when it failed to

conduct a polygraph examination to exonerate Barr. The evidentiary value of such evidence is doubtful, at best. A union's good faith, non-arbitrary failure to take an action that is unlikely to be advantageous does not subject it to liability for breach of its duty of fair representation. *Vaca, supra.*

In view of our conclusion that there was insufficient evidence to support a verdict that Local 804 breached its duty of fair representation, we need not consider the other claims of error raised by UPS and Local 804.

Judgment vacated; complaint dismissed.

American Arbitration Association
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
LOCAL 804, I.B.T.
and
UNITED PARCEL SERVICE, INC.

CASE NUMBER: 1330 0373 83

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated 1982 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

There was just cause for the discharge of Joseph L. Barr.

s/ Arthur Stark
Arbitrator's signature (dated)
Dated: April 7, 1983

STATE OF New York
ss.:
COUNTY OF New York)

On this 7 day of April , 1983, before me personally came and appeared Arthur Stark to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

s/ Dorothy C. Stark

DOROTHY C. STARK
Notary Public, State of New York
No. 31-9156625
Qualified in New York County
Commission Expires [illegible]

OPINION

The Issue:[1]

Was there just cause for the discharge of Joseph L. Barr? If not, what shall be the remedy?

Mr. Barr, a sorter with fourteen years of service, worked in the Brooklyn-slide area at Maspeth in March 1983. He was assigned to the 5:45 p.m.-2:45 a.m. shift. While he had not seen a posted notice on the subject, he was familiar with the requirement that employees show the contents of any bag or container in their possession upon leaving work.[2]

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[1]At an arbitration hearing conducted in New York City of March 14, 1983, United Parcel Service, Inc. was represented by Aaron Schindel, Attorney; Local 804, I.B.T., by Stanley M. Berman, Attorney.

[2]A Notice posted at various places in the building on or about February 11, 1983, read in part:

> In order not to compromise the safety of our people and provide for proper security measures, it will be imperative that all employees adhere to the following procedures:
>
> 1. All employees are required to show their I.D. Card when entering the building.
>
> 2. Entering and exiting is allowed through the 56th Road Lobby or through the 48th Street pedestrian gate. Any other exit is restricted.

When Barr left work at about 3:50 a.m. on Tuesday, March 1, 1983, he carried a flat brown 11 1/2 x 14 paper bag. The Company contends that he refused to show Security Guard Antonio Mateo what was in it. Barr states that he did.

On March 3 Maspeth Division Manager David V. Donnelly conducted a hearing in his office which was attended by Barr, his steward Al Henley, Loss Prevention Manager John P. Tobin, Loss Prevention Clerk James R. Albert, and Mateo. At the conclusion of the hearing Donnelly discharged Barr for "breach of security."

At a grievance discussion on March 7, Business Agent William A. Pritchard testified, he informed District Manager Thomas Petley that the Union had a couple of witnesses who had been with Barr on the night in question, but he did not identify them. He asked Petley to reconsider the decision in light of Barr's long years of service and outstanding record. Petley said that he would make his decision after conferring with Tobin.

On March 9 Pritchard again appealed to Petley and stated that the Union had witnesses to the incident. On the following day Petley informed the business agent that Management's decision was final.

The Evidence

At the March 14 arbitration hearing, testimony concerning the incident and surrounding events was offered by Mateo, Albert, Barr, and two other night shift employees, Johnny L. Scott and Harold Griffin. They testified in sub-

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3. Employees exiting the building with any bags, attache cases, etc., must open them for inspection by the guard on duty. Failure to do so may result in the employee's discharge.

stance as follows:

Mateo: He has been assigned by Siro Security to the UPS Maspeth facility for about eight years. He checks the IDs of incoming employees and the personal belongings of outgoing employees, and watches automobiles.

Between 2:30 and 3:00 a.m. on March 1—he did not check his watch—he observed Barr and another man come past the glass partition on their way out. He walked over and said to Barr (whose name he did not then know), "Can I examine your bag?" (The employee held a grocery bag in his left hand by his side. His right hand was empty.) Barr said "No," and kept on going. He and his companion (whom Mateo did not recognize) continued past the main gate.

He (Mateo) immediately went to the nearby Loss Prevention office. He explained to Albert what had occurred and they both went outside where he observed Barr and companion walking towards 48th Street. He pointed them out to Albert, who went after them.

Only one other person—a supervisor—came out of the facility during this 5- to 10-minute period.

When Albert returned he went inside the L/P office, subsequently emerging with a statement he asked Mateo to sign. It read: "At approx. 3:50 a.m. I witnessed an employee leaving through lobby with a paper bag and asked him to Open the bag please. The employee said no and continued to walk off property. I then notified Jim Albert of Loss Prevention."

Albert: He has been working as a part-time L/P Clerk for 5-1/2 years; he works regularly as a New York City police officer. Among his responsibilities at UPS is super-

vision of the Siro guards.

Mateo reported the incident on March 1 at about 3:50 a.m. (he looked at his watch). When they exited, Mateo pointed up the street where two men were walking. He (Albert) called out. The men turned, looked back, but kept on walking. He followed. He caught up as the two were getting into a car. Barr (he learned the name later) had a paper bag in one hand. Albert: "I'm Jimmy Albert from Loss Prevention. The lobby guard says you didn't open the bag for inspection." Barr (bringing the bag up to eye level): "Here, look. Do you want to look into the bag?" (He brought some papers out part way.) Albert: "No. Who do you work for?" Barr (closing the door): "UPS." Then he looked carefully at Barr so he could identify him, returned to the facility, questioned Mateo about the incident, and wrote two statements: one for Mateo and one for himself.

Barr: Early in the shift Steward John Brown gave him some blank Dental Plan forms. He emptied a brown paper bag in his locker and placed the forms inside. He took the bag with him when he left work, accompanied by Harold Griffin and Johnny Scott, who had asked him to give them a ride because their driver was on vacation. He held the bag in his left hand, his car keys in his right. He was in a hurry to leave because his mouth was bleeding and painful due to recent oral surgery. At the guard station Mateo asked to see the contents of the bag. He put the keys in his pocket, removed the papers from the bag, turned it upside down, shook it, put the papers back, and walked on.

He and his companions turned left at the main gate and walked about six car lengths to his automobile. He heard someone say, "Hey buddy," at which juncture Albert (he did not know his name) was behind them. (He did not hear any earlier call.) He turned around. Albert: "You didn't show your bag to a security officer." Barr: "I did. I

just showed it to the man at the door." He pulled out the dental forms, which he showed to Albert, and shook the bag. Albert: "Who do you work for?" Barr: "UPS."

Then he unlocked the car and got in. Albert took down his license number and walked back towards the gate. At this point a supervisor (whom he knew by sight but not by name) drove up and asked what the problem was. He explained that a guard had asked him about a bag and he had shown its contents. The supervisor left.

Before the hearing with Donnelly on March 3, Steward Henley told him that he was being accused of having refused to show the contents of his bag to Mateo. He told Henley it was not true and that Griffin and Scott had been present. He also told Henley about the Supervisor who had driven up. At Henley's request he got the paper bag from his car, where it had remained. At the hearing he explained to Management what had occurred but did not mention the supervisor or the two employees who had been with him; neither did Henley.

Griffin: When he, Barr and Scott left, Barr was carrying a flat brown paper bag. He (Griffin) had a green shoulder bag in which he usually carries his lunch. Barr was the first to reach Mateo. He observed him open the bag, remove papers, turn it upside down and replace the papers inside the bag. Mateo said something he could not hear. Scott was the next in line. He (Griffin) opened his bag for Mateo's inspection. All three exited.

On their way to Barr's car he did not hear anyone call. When Albert came up he asked Barr whether he had shown the paper bag to the guard. Barr replied, "Yeah, you want to see?" and he pulled the forms out again and turned the bag over. Albert then took the license number.

When he heard on March 4 about Barr's discharge, and the reason, he told Steward Henley, "That's impossible because we were there." He did not, however, report anything to supervision or Loss Prevention.

Scott: This was the first week the three men rode together. On their way out, Barr, in front, had the paper bag; Griffin, in the rear, had a green army-type canvas bag. Mateo asked to see the contents of Barr's bag. Barr removed the papers, turned the bag upside down, and replaced the papers. All three exited slowly together. A few others left the building at about this time.

On the way to the car he heard someone call, "Hey, fella," but he did not turn around since his name is not "Fella." At Barr's car, a man (Albert) came up while he and Griffin were getting in. Albert asked why Barr had not shown his bag to the security guard. Barr said he only had forms, and he removed the papers from the bag which he turned upside down. Albert asked where he worked and Barr said, "UPS."

On March 4 Steward Henley told him that Barr had been fired. That was the extent of their conversation.

*

At the hearing he conducted on the night of March 3-4, Division Manager Donnelly testified, Mateo described the incident as set forth above. Albert added to his story this statement from Barr: "Here, see what's in the bag," and Albert's response, "It's too late now." Barr stated that he had opened his bag for both Mateo and Albert and said he was sorry he had been misunderstood. Mateo, and either Barr or Steward Henley, said that another man was present but they did not say who. He (Donnelly) did not ask to speak to that person. (Generally, when the Union asks

him to interview witnesses, he withholds action until he has done so.)

Before this hearing, Donnelly testified, he had asked Supervisor Paul Imbriale what he knew of the Barr incident. Imbriale said that Mateo had asked him, as he was leaving, to be a witness to the fact the Barr had left without showing his bag, but he told Mateo he had not seen the incident.

Donnelly also recalled that Business Agent Pritchard had told him on March 9 or 10 (after the discharge) that the Union had more than one witness, but he did not ask for names nor did Pritchard supply them.

Steward John F. Callan testified that he spoke with Supervisor Imbriale on March 10. The supervisor reported that: (1) He had not seen the incident at the guard station; he had seen 3 or 4 guys leaving and had noticed that "Security" went outside and talked with Barr. (2) He had driven over to Barr's car in which Barr, Griffin and a third man were seated. (3) He had been asked to write a statement but declined because he had witnessed nothing.

Discussion

About seven months before this incident, a Maspeth employee with nine years of service walked past Siro Security Guard Mateo at about 3 a.m. without permitting the guard to check the contents of a small tote bag. The employee returned about two minutes later to offer his bag for inspection. The guard did not comply. The employee (Jeffrey Jones) was subsequently discharged and his case appealed to arbitration. Mateo's credibility was questioned at the arbitration hearing, since the grievant presented a somewhat different version of what had happened after he passed the guard. Union witnesses, moreover, testified that the inspection rule had not been consistently enforced.

In his December 10, 1982 Award, Arbitrator Milton Friedman concluded that Mateo was a credible witness (AAA Case No. 1330-1051082). After finding that the grievant had, indeed, violated the rule, he gave these reasons, among others, for sustaining the discharge:

> To accept such conduct as merely a technical violation of a rule would make it impossible for the Company to enforce normal, justifiable security controls. While dishonesty as such was not proven on July 29, all the elements that enable someone to walk out with Company property were present. They were the Grievant's voluntary actions in the scenario he created. Dishonesty is a major problem for many companies, and no arbitrator upholds conduct that, without any cause or plausible reason, can contribute to it.
>
> Moreover, to treat such conduct as a "technical" violation of policy, but no substantial misconduct, could make enforcement of a security policy impossible. There is no way to be sure that the Grievant removed anything of the Company's. The same would be true of future violations like this were the Grievant's conduct accepted. Thus, where security policy is reasonable, a breach of it like this is validly looked upon with the same seriousness as dishonesty. . . .
>
> A penalty short of discharge would be unwarranted, not only in itself, but also because it would signify that a proper

> security policy could be sometimes breached at will, and offending employees still be retained. That would ultimately be a disservice to both Company and employees.
>
> If someone comports himself like one who acts dishonestly, and there is no good reason to think otherwise, the Company is justified in drawing the logical conclusion. While dishonesty in this context is not "proven," the Grievant's conduct is consistent with an admission of dishonesty . . . . Since the Grievant has acted as one who feared exposure if his bag were examined, the Company could reasonably conclude that he was admitting dishonesty.

In Management's view, the *Jones* decision is applicable here since Barr was guilty of the same infraction. The Union, on the other hand, contends that: (1) Barr complied with the rule, as he and his coworkers testified. (2) At the very least, there is substantial doubt about what occurred. (3) Even if Barr did not comply with the rule, discharge was too severe a penalty in light of his many years of good service, his reputation in the community, and the flexibility of the rule itself: "Failure to do so *may* result in the employee's discharge" (emphasis added).[3]

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[3]A "To Whom It May Concern" letter dated March 11, 1983 and signed by New York State Assemblyman William F. Boyland was introduced as evidence of Barr's good reputation and character. Boyland, who had known Barr for fifteen years, believed the reason for his termination to be "ludicrous." Barr had always maintained an "honorable and religious posture," the assemblyman wrote, and would never attempt to take that which is not his.

As in most discharge cases, there are two questions to be resolved here: (1) Was the employee guilty of the rule violation or misconduct with which he was charged? (2) If so, was the penalty too severe?

With respect to the initial question I have carefully reviewed all the testimony and the parties' detailed arguments. Reluctantly—in light of the grievant's long service and apparent high standing in the community—I must conclude that he did, indeed, violate the rule. To discredit the guard's account and credit that of Barr's two coworkers I would have to believe that (1) either Mateo was unable to observe and accurately report his observations or he deliberately fabricated a story, and (2) Union stewards, knowing that termination was being considered, and having two witnesses, deliberately withheld their identities at the March 3 hearing and at the grievance hearing a few days later when Management could have reconsidered or revised its discharge decision. I cannot accept that scenario.

There is no evidence that Mateo had an ulterior motive or that he ever brought dubious or frivolous charges against UPS employees. He had no axe to grind with Barr. It is apparent, moreover, that he had a clear vision of Barr and the brown paper bag which the employee held in his left hand. It is not possible to believe that if Barr had emptied the bag and turned it over, those actions would have gone unnoticed by Mateo. In fact, neither Barr nor his co-workers suggested that Mateo had turned away or was distracted during that alleged action; nor could such action have been misinterpreted or ignored by someone who had just requested it and was standing right there.

With respect to the alleged withholding of critical and exculpatory information, Union counsel suggests that the parties at Maspeth may have been engaged in "adversarial tactics" which involved holding back key facts or names

until arbitration. But that is speculation; no Union witness volunteered such explanation and Steward Henley, who is alleged to have known about Scott and Griffin before the March 3 meeting with Donnelly, was not called to testify although he was present at the arbitration hearing. Business Agent Pritchard, who did testify, did not explain why he did not give any names to the district manager at the grievance discussions.

The most plausible explanation of these events, in light of the entire record, is that the exculpatory witnesses could not provide evidence which Management would have found convincing. It is not unheard of that coworkers will help a friend in distress and that, apparently, is what occurred here.

Was the penalty, then, too severe? I cannot accept the idea that the penalty should be reduced because of a substantial doubt about whether the grievant complied with the rule. If such doubt existed I would uphold the claim in its entirety and order Barr reinstated with full pay and seniority rights.

The Union also suggests that a lesser penalty was available under the rule itself and would be justified here if it is found that the grievant is guilty as charged.

It is true, of course, that there is no evidence that Barr actually took anything which was not his. Had he done so, however, there would have been no other opportunity to find it. That is the whole point of the rule and the severe penalty which is attached to it. The rule does use the words, "may result in discharge," as the Union points out; and there may be situations where compliance is ambiguous or mitigating circumstances exist. But none of these conditions obtained on March 1. The grievant has not explained why he did not comply with the rule on this

particular day, and the Union has not brought forth any cases (either in this or the *Jones* proceeding) where a deliberate flouting of the rule was not treated as an act calling for termination.

Under all these circumstances, the grievance must be denied.

s/ Arthur Stark

Arthur Stark
April 7, 1983 EDNY
83 cv 4449
SIFTON

United States Court of Appeals
for the
SECOND CIRCUIT

MANDATE
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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of February one thousand nine hundred and eighty-nine.

Present: HON. J. EDWARD LUMBARD
HON. J. DANIEL MAHONEY, Circuit Judges,
HON. CON G. CHOLAKIS, District Judge*

Docket Nos. 88-7230
88-7244

JOE L. BARR, a/k/a JOSEPH L. BARR,
Plaintiff-Appellee
(re: 88-7230),
-against-
UNITED PARCEL SERVICE, INC., and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
defendants,
LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant-Appellant

(re: 88-7230).

UNITED PARCEL SERVICE, INC.,
Defendant-Appellee
(re: 88-7230),
JOE L. BARR, a/k/a JOSEPH L. BARR,
Plaintiff-Appellee
(re: 88-7244),
-against-
UNITED PARCEL SERVICE, INC. and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants,
UNITED PARCEL SERVICE, INC.,
Defendant-Appellant
(re: 88-7244).

--*--

April 25, 1989

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS

FILED
FEB 10, 1989
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is vacated and the complaint is dismissed in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk
By:

s/Edward J. Guardaro

_____
Edward J. Guardaro
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH

s/ Elaine B. Goldsmith
ClerkUnited States Court of Appeals
for the
SECOND CIRCUIT
MANDATE

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of April one thousand nine hundred and eighty-nine.

Present: HON. J. EDWARD LUMBARD
HON. J DANIEL Circuit Judges,
HON. CON G. CHOLAKIS, District Judge

Docket Nos. 88-7230

88-7244

JOE L. BARR, a/k/a JOSEPH L. BARR,
Plaintiff-Appellee
(re: 88-7230),
-v-
UNITED PARCEL SERVICE, INC., and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants,
LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendant-Appellant
(re: 88-7230),
UNITED PARCEL SERVICE, INC.,
Defendant-Appellee
(re: 88-7230),

****

JOE L. BARR, a/k/a JOSEPH L. BARR,
Plaintiff-Appellee
(re: 88-7244),
-v-
UNITED PARCEL SERVICE, INC. and LOCAL 804 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants,
UNITED PARCEL SERVICE, INC.,
Defendant-Appellant
(re: 88-7244).

UNITED STATES COURT OF APPEALS

FILED:
APR 17, 1989
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

A petition for a rehearing having [sic] been filed herein by counsel for the Plaintiff-Appellee, Joe L. Barr.

Upon Consideration thereof, it is ORDERED that said petition be and it hereby is DENIED.

s/ Elaine B. Goldsmith

ELAINE B. GOLDSMITH
Clerk